Supreme Court, U. S.
FILED
JUN 21 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

77-1804

NO. _____

DOUGLAS C. THOMSON

Petitioner,

vs.

L. JOHN ONSTAD, SHERIFF, GALLATIN COUNTY, MONTANA; and ROGER CRIST, WARDEN, MONTANA STATE PRISON

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JAMES H. GOETZ, ESQ.
Goetz & Madden
522 West Main Street
Bozeman, Montana 59715
Attorney for Petitioner

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

DOUGLAS C. THOMSON,

Petitioner,

-vs-

L. JOHN ONSTAD, Sheriff, Gallatin County, Montana; and ROGER CRIST, Warden, Montana State Prison,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

TABLE OF CONTENTS

	PAGE
TABLE OF CITATIONS	ii
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTES INVOLVED	3
STATEMENT	4
REASONS FOR GRANTING THE WRIT	11
A. THE STATE COURT HAS DECIDED A FEDERAL CONSTITUTIONAL QUESTION IN A WAY PROBABLY NOT IN ACCORD WITH APPLICABLE DECISIONS OF THIS COURT	11
B. THE NINTH CIRCUIT HAS APPLIED STONE V. POWELL IN A MANNER PROBABLY NOT INTENDED BY THIS COURT	14
C. WHEN A STATE COURT MAKES A SERIOUS LEGAL ERROR IN CONSTRUING THE FEDERAL FOURTH AMENDMENT, THE DEFENDANT IS NOT AFFORDED AN OPPORTUNITY FOR FULL AND FAIR LITIGATION OF HIS FOURTH AMENDMENT CLAIM	21
CONCLUSION	26
CERTIFICATE OF SERVICE	26
APPENDIX A	

TABLE OF CITATIONS

	PAGE
Cases	
Aguilar v. Texas, 378 U.S. 108	22 23
Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 ..	19
Brewer v. Williams, 97 S.Ct. 132 ..	14 15 17
Fay v. Noia, 372 U.S. 391	17 20
Jarrell v. Stahl, 446 F. Supp 395 (W.D.N.C.)	13 14 17
Mack v. Cupp, 564 F. 2d 898 (9th Cir)	21 24
Spinelli v. United States, 393 U.S. 410	23
State v. Thomson, 169 Mont. 158; 545 P. 2d 1070	1
Stone v. Powell, 428 U.S. 465	passim
Tisnado v. United States, 547 F. 2d 452 (9th Cir.)	24
Townsend v. Sain, 372 U.S. 293	21
United States v. Anderson, 453 F. 2d 174 (9th Cir.)	12
Whitely v. Warden, 401 U.S. 108 ...	22
Wolff v. Rice, 428 U.S. 465	12

TABLE OF CITATIONS

Statutes & Constitutional Provisions	PAGE
1. U. S. Constitution, Fourth Amendment	passim
2. 28 U.S.C. 2241-2253	4
3. Revised Codes of Montana (1947) Sec. 54-132	4
Revised Codes of Montana (1947) Sec. 54-133	4
4. U. S. Supreme Court Rules, Rule 19	11

Miscellaneous

Neuborne, Burt, "The Myth of Parity", 90 Harv. L.R. 1105 ... 25

The petitioner, Douglas C. Thomson, respectfully prays that a writ of certiorari issue to review the judgment and decision of the United States Court of Appeals for the Ninth Circuit entered in this case on March 24, 1978.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, affirming the denial of federal habeas corpus relief by the United States District Court for the District of Montana, is as yet unreported; it is set forth in the Appendix, infra, at A-1. The initial opinion of the District Court of June 30, 1976, which granted habeas corpus relief, was printed at 417 F. Supp. 747, but was later withdrawn. It is set forth in the Appendix, at A-2. The second opinion of the District Court which withdrew the first opinion and denied habeas corpus relief is not reported and is set forth in the Appendix at A-11. The opinion of the Montana Supreme Court, State v. Thomson, is reported at 169 Mont. 158 and 545 P. 2d 1070, and is set forth in the Appendix

at A-13.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was made on March 24, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(i). Because this is a habeas corpus matter, which is classified as a civil action, the time within which a petition for Writ of Certiorari must be filed is ninety days, 28 U.S.C. 2101(c).

QUESTIONS PRESENTED

This Court, in Stone v. Powell, 428 U.S. 465 on July 6, 1976, held generally that where a state has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial.

In light of this holding in Stone v. Powell, the questions presented are:

I.

Whether a Federal Court retains some

limited discretionary power to grant habeas corpus relief in cases where the Fourth Amendment violations are particularly egregious or whether Stone v. Powell absolutely precludes the grant of Federal habeas corpus relief.

II.

Whether Petitioner was denied an opportunity for full and fair litigation of his Fourth Amendment claim because the State Court, while giving a reasonably full procedural opportunity to present the Fourth Amendment claim, grossly misconstrued Federal Fourth Amendment Constitutional Law.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourth Amendment to the United States Constitution is as follows:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

The Montana statutes dealing with criminal sale of dangerous drugs (54-132, R.C.M.) and criminal possession of dangerous drugs (54-133, R.C.M.) are set forth in the appendix, pp. A-21, A-22, These statutes are found in the 1975 Cumulative Pocket Supplement to Vol. 3, Part 2, R.C.M., at pp. 499-501.

The basic Federal habeas corpus statute, 28 U.S.C. 2241, is set forth in the appendix at A-24 and is found in Vol. 28 U.S.C.A. §§2241-2253, at p.23.

STATEMENT OF THE CASE

Petitioner, Douglas C. Thomson, was convicted of possession and sale of amphetamines on February 6, 1975, in violation of Secs. 54-133 and 54-134, R.C.M. (1947). His conviction was affirmed by the Montana Supreme Court on January 20, 1976, 169 Mont. 158; 545 P.2d 1070. The U.S. District Court granted petitioner a writ of habeas corpus on June 30, 1976, 417 F.Supp. 747 (opinion withdrawn), but reversed itself on the basis of Stone v. Powell, 428 U.S. 465 (July 6, 1976) on October 26, 1976. The Ninth Circuit Court of Appeals affirmed the denial

of relief on March 24, 1978. [No. 77-1009].

Informant, Paul Hallett came to Livingston, Montana, approximately November 1, 1974 (St. Tr. 49-50). 1/ On the evening of November 16, 1974, Hallett was apprehended and later jailed for writing bad checks. He had written about five bad checks in Montana (St. Tr. 35) and was wanted in Nebraska on felony fraudulent check charges. (St. Tr. 34, 35).

After being jailed for about one and one-half hours, Hallett volunteered information regarding Petitioner, Thomson, and the purchase of dangerous drugs. (St. Tr. 35). Hallett told the police

---

1/ - The initial criminal trial of Petitioner was held in Montana District Court on February 5, 1975. Reference to the transcript of that trial is hereinafter made as "St. Tr." A hearing was held in U. S. District Court on Petitioner's habeas corpus petition on February 10, 1976. Reference to that transcript is hereinafter made as "Fed. Tr." In addition to these transcripts a deposition of the State's major witness, Paul Hallett, was taken on December 5, 1974. Reference to that deposition is hereinafter made as "Dep.".

that he had been to Thomson's house nine days previously and had purchased 25 amphetamine pills from Thomson for five dollars. (Dep. 7-9). During this interview, Hallett was promised by the Prosecutor immunity from prosecution on any drug-related charge. (Dep. 41, 42).

On the basis of Hallett's statement a police officer made an affidavit for search warrant reciting the facts as related by Hallett. (Copy of affidavit attached A-25.). The affidavit purported to be upon the personal knowledge of the police officer and gave no information or reasons upon which a reviewing magistrate could conclude that Hallett was a reliable person. Nor did it mention Hallett's criminal record and the fact that Hallett was jailed in Livingston, Montana, on bad check charges.

At approximately 2:00 A.M., November 17, 1974, the prosecutor, Hallett, and a police officer, went to the home of the local district judge, who, after questioning Hallett and the policeman, issued a search warrant for Thomson's house. (St. Tr. 11). A quantity of

of amphetamine (approximately 70 pills) [R. p. 2] was found in the Thomson house 2/.

2/ - No amphetamine pills were found on the person of Douglas C. Thomson. (St. Tr. p. 98). The pills were found between mattresses in the main floor bedroom. (St. Tr. p. 55). Thomson was in the basement at the time of his arrest. (St. Tr. p. 98). Three witnesses, Douglas C. Thomson, Paulette Thomson, his wife, and Les Pintar testified that the amphetamines belonged to Paulette Thomson, not Douglas C. Thomson. (St. Tr. pp. 126-129). State offered no evidence to contradict this.

Thomson was charged with possession and sale of amphetamines. The sole evidence presented at the trial regarding the sale of dangerous drugs was the testimony of the informant, Hallett.3/

Petitioner moved to suppress the amphetamine pills as illegally seized. The essential basis for Petitioner's suppression motion was the obvious unreliability of the informant. The record shows that the informant was a bald liar, a convicted forger of checks, who sometimes signed checks by the name "Mack Bolin", "a fictional killer of Mafia." (St. Tr. 36), a self-proclaimed seller

---

3/ - With respect to the sales charge, not even the drugs alleged to have been sold by Petitioner to Paul Hallett were introduced at the trial. This is because Hallett claimed he resold the amphetamines later the same evening (St. Tr. 39), and they thus were unavailable as evidence. There were no witnesses supporting the sales charge other than Paul Hallett. All other witnesses present in the Thomson home on the evening in question denied Hallett's allegation that Thomson sold Hallett amphetamines. (See testimony of Douglas Thomson, St. Tr. p. 184; Mike Adams, St. Tr. p. 163; Becky Moore, St. Tr. p. 160; Paulette Thomson, St. Tr. p. 133.)

of illicit drugs (St. Tr. 39) and a transient who had been in Livingston, Montana, fewer than three weeks before his arrest when he gave information relating to Petitioner. The suppression motion, in part, was based on the federal Fourth Amendment and Federal Constitutional interpretations. (St. Tr. 3-5,9).

At the suppression hearing the local District Judge was allowed, over objection (St. Tr. 9), to testify in an attempt to buttress the search warrant. He stated that, at the time of the issuance of the warrant, he had inquired of the informant the underlying circumstances of the alleged sale and that he personally was aware of Petitioner's reputation as "a suspect" in the drug scene. (St. Tr. 10-19). The suppression motion was denied.

Petitioner's motion for separate trials on the sales and possession charges was denied. Petitioner was convicted by a jury on both the sale and possession counts. Petitioner's appeal to the Montana Supreme Court was based, in part, on Federal Fourth Amendment issues. The

Montana Supreme Court affirmed the conviction. Petitioner filed for a writ of habeas corpus in Federal District Court. The Federal District Court granted the writ and ordered Petitioner retried within sixty days or released. However, six days after this ruling by the District Court, this Court decided Stone v. Powell, supra. On reconsideration the District Court reversed its grant of relief to Petitioner. The second District Court opinion indicates no change in the District Court's opinion on the merits -- that Petitioner's conviction was obtained in violation of his Fourth Amendment rights. The District Court, however, apparently felt that Stone v. Powell left it powerless to grant relief and consequently reversed itself.

On appeal the Ninth Circuit Court of Appeals affirmed in a one-sentence opinion, stating: "The judgment of the District Court is affirmed on the basis of Stone v. Powell, 428 U.S. 465 (1976)."

Throughout the legal proceedings Petitioner has been released on bail. By stipulation the State of Montana has

agreed to the continued release of Petitioner pending disposition of the present matter by the U. S. Supreme Court.

REASONS FOR GRANTING THE WRIT

A. THE STATE COURT HAS DECIDED A FEDERAL CONSTITUTIONAL QUESTION IN A WAY PROBABLY NOT IN ACCORD WITH APPLICABLE DECISIONS OF THIS COURT.

Rule 19(1) of the rules of this Court indicates the general character of reasons which will be considered in connection with a Petition for Certiorari. Rule 19 (2) indicates one of these considerations as follows:

> "Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court."

The decision of the Montana Supreme Court (A-13) which affirmed the conviction of Petitioner held that in reviewing the sufficiency of an application for a search warrant, a court may go beyond the four corners of the application. (A-15, 16). This ruling is squarely contrary to

applicable Federal Constitutional law. Ironically, the case which most clearly sets forth this proposition of Federal Fourth Amendment law is Stone v. Powell, supra. (and its companion case, Wolff v. Rice (428 U.S. 465):

> Petitioner Wolff contends that police should be permitted to supplement the information contained in an affidavit for a search warrant at the hearing on a motion to suppress, a contention that we have several times rejected. See e.g. Whitely v. Warden, 401 U.S. 560, 565, n. 8 ...; Aguilar v. Texas, [378 U.S. 108] at 109 n. 1; ... and need not reach again here. (n. 3)

The Ninth Circuit has also clearly rejected the contention that oral testimony can be used to bolster an otherwise insufficient search warrant affidavit.

> This case poses an important problem in the evaluation of affidavits to determine probable cause for issuance of search warrants under the Fourth Amendment. We hold that all data necessary to show probable cause for the issuance of a search warrant must be contained within the four corners of a written affidavit given under oath. United States v. Anderson, 453 F. 2d 174 at 175 (1971, 9th Cir.)

Thus, the present petition involves a clear mistake by the State Court in interpretation of Federal Constitutional law. This is what the Federal District Court ruled in its initial decision prior to Stone v. Powell. Admittedly a direct Petition to this Court from the decision of the State Court would have been a more straightforward approach to rectify this clear error by the State Court. However, at the time of that decision (Jan. 20, 1976), this Court had not decided Stone v. Powell, and remedy via Federal habeas corpus appeared to be a more viable remedy. The present petition is in a situation identical to that discussed by Judge McMillan in Jarrell v. Stahl, 446 F. Supp. 395 (W.D.M., 1977):

> "There is another circumstance raising questions of fundamental fairness which should not be overlooked. Certiorari to State courts to review Fourth Amendment violations is not foreclosed by Stone v. Powell. However, in April of 1975 when the Supreme Court of North Carolina refused certiorari to (defendants), review of Fourth Amendment claims by way of habeas corpus petition in Federal Courts was the accepted practice.

"...

"If they had known that collateral review on habeas corpus was not available, it would appear that they would have sought certiorari. 446 F. Supp. 395 at 398.

Petitioner is in the same position in the present case.

B. THE NINTH CIRCUIT HAS APPLIED STONE V. POWELL IN A MANNER PROBABLY NOT INTENDED BY THIS COURT.

In the present case the District Court determined that Petitioner's Fourth Amendment rights had been violated (A-10), yet it found itself without the power to remedy this violation because of Stone v. Powell, supra. It is respectfully submitted that the District Court's wooden application of Stone v. Powell was incorrect. Petitioner submits that, even after Stone v. Powell a Federal Court retains limited discretion to exclude evidence where Fourth Amendment violations are particularly egregious.

Justice Powell, the author of the Stone v. Powell opinion, stated the next term in his concurring opinion in Brewer v. Williams:

> In discussing the exclusionary rule, the dissenting opinion of the Chief Justice refers to Stone v. Powell ... decided last term. In that case, we held that a federal court need not apply the exclusionary rule on habeas corpus review of a Fourth Amendment claim absent a showing that the state prisoner was denied an opportunity for a full and fair litigation of that claim at trial and on direct review. 97 S.Ct. 132 4/ (Emphasis added).

4/ - Justice Powell, in his concurring opinion, specifically reserved passing judgment on the question of the impact of Stone on Fifth and Sixth Amendment cases, stating that the matter had been inadequately briefed and argued. It is obvious, however, from Chief Justice Burger's dissent and from the facts of the case that Brewer cannot be constitutionally distinguished from Stone. The only possible distinguishing rationale ventured by Powell is that "many Fifth and Sixth Amendment claims arise in the context of challenges to the fairness of a trial or to the integrity of the fact-finding process." 45 U.S.L.W. 4295. It was crystal clear in Brewer, however, that the evidence resulting from the unconstitutional action was highly probative and fully reliable.

Thus, while Justice Powell (who was the author of the decision in Stone v. Powell) proferred a desire to avoid the question, the stark fact is that Brewer has eroded, sub silentio, the Stone decision.

The use of the words "need not" by Justice Powell is important - particularly since Justice Powell authored the decision in Stone v. Powell. "Need not" implies that a Federal Court has discretion. It implies that, when faced with the question in habeas corpus whether to exclude evidence illegally seized and admitted in state Court, the Federal Court "need not" exclude such evidence but that it may, if the circumstances warrant. This interpretation of Justice Powell would give the Federal Court the flexibility to judge how egregious the constitutional violation was in relation to the cost to society of excluding otherwise probative evidence. As Justice Powell stated:

> I tend generally to share the view that the per se application of an exclusionary rule has little to commend it except ease of application. All too often applying the rule in this fashion results in freeing the guilty without any offsetting exhancement of the rights of all citizens ... I therefore have indicated, at least with respect to Fourth Amendment violations, that a distinction should be made between flagrant violations by the police on the

> one hand, and technical trivial, or inadvertent violations on the other. Brown v. Illinois, 422 U.S. 590, 606 (1975) (concurring opinion). (fn. 2).

In light of the decision in Brewer v. Williams, and in light of the language in Justice Powell's concurrence, it cannot be concluded that a Federal Judge is entirely without power to exclude unconstitutionally seized evidence simply because the case involves Fourth Amendment issues. Rather, as established in Fay v. Noia, 372 U.S. 391, the Federal Court retains the flexibility to fashion a remedy appropriate to the accomplishment of justice under the circumstances. "It is of the historical essence of habeas corpus that it lies to test proceedings so fundamentally lawless that imprisonment pursuant to them is not merely erroneous, but void ..." (At 423).

In Jarrell v. Stahl, 446 F. Supp. 395 (1977) the District Court discussed the rationale underlying Stone v. Powell as follows:

> In Stone v. Powell, 428 U.S. at 488, 96 S.Ct. at 3049, referring to a previous decision in Walder

> v. United States, 347 U.S. 62 ... (1954), the Supreme Court said:
>
> "... The judgment in Walder revealed most clearly that the policies behind the exclusionary rule are not absolute. Rather, they must be evaluated in light of competing policies. In that case, the public interest in determination of truth at trial was deemed to outweigh the incremental contribution that might have been made to the protection of Fourth Amendment values by application of the rule." 446 F. Supp. 395 at 397.

The Court then proceeded to distinguish the circumstances in Stone v. Powell from the case before it finding that "... the 'proportionality' referred to by the court in Stone v. Powell is strikingly lacking here." 446 F. Supp. 395 at 398. While the court, finding itself bound by Stone v. Powell, ruled against Petitioner there, its ruling must be taken as critical of Stone v. Powell because it felt deprived of the power to grant a remedy proportional to the constitutional abuse.

It is respectfully submitted that Stone v. Powell should not be applied so as to divest a District Court of all

discretion in a habeas corpus matter. Both Chief Justice Burger and Justice Powell have been critical of mechanical, inflexible application of the exclusionary rule. For instance, Chief Justice Burger said in his dissent in Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388:

> "I submit that society has at least as much right to expect rationally graded responses from judges in place of the universal 'capital punishment' we inflict on all evidence when police error is shown in its acquisition ... yet for over 55 years .. our legal system has treated vastly dissimilar cases as if they were the same." 403 U.S. 388 at 419.

The response of the lower Federal Courts to Stone v. Powell has not been been "rationally graded". Rather, they have virtually universally denied relief, no matter how slight the crime and no matter how egregious the Fourth Amendment violation and no matter how clear the mistake in law made by the State court. Surely this is not the rationally graded response hoped for.

In another context (the need to

exhaust state remedies prior to seeking Federal habeas corpus relief), this Court has reaffirmed the discretionary nature of the role of the Federal Court in habeas corpus proceedings. See Fay v. Noia, 372 U.S. 391:

> Although we hold that the jurisdiction of the federal courts on habeas corpus is not affected by procedural defaults incurred by the applicant during the state court proceedings, we recognize a limited discretion in the federal judge to deny relief to an applicant under certain circumstances. Discretion is implicit in the statutory command that the judge, after granting the writ and holding a hearing of appropriate scope, "dispose of the matter as law and justice require," 28 U.S.C. §2243; and discretion was the flexible concept employed by the federal courts in developing the exhaustion rule. Furthermore, habeas corpus has traditionally been regarded as governed by equitable principles. United States ex rel. Smith v. Baldi, 344 U.S. 561, 573, 97 L. Ed. 549, 558, 73 S. Ct. 437 (dissenting opinion). 372 U.S. 391 at 438. (Emphasis added).

It is respectfully submitted that this Court should grant certiorari to review the question whether a Federal

Court has limited discretion in egregious cases to grant relief to a petitioner held in State custody whose Fourth Amendment rights have been violated.

C. WHEN A STATE COURT MAKES A SERIOUS LEGAL ERROR IN CONSTRUING THE FEDERAL FOURTH AMENDMENT, THE DEFENDANT IS NOT AFFORDED AN OPPORTUNITY FOR FULL AND FAIR LITIGATION OF HIS FOURTH AMENDMENT CLAIM.

Stone v. Powell, supra, provided that where a state has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at trial Stone v. Powell, however, did not "delineate the perimeters of 'full and fair litigation' of a Fourth Amendment claim." Mack v. Cupp, 564 F. 2d 898 at 900 (9th Cir. 1977). Stone did, however, refer to Townsend v. Sain, 372 U.S. 293 (1963) which established a six-part set of criteria for determining when a federal district court should hold an evidentiary hearing in a habeas corpus proceeding. 428 U.S.

at 494, n. 36.

The question presented by the present Petition is whether a full and fair opportunity to litigate the Fourth Amendment claim is denied where the state court makes a clear error in law in its Fourth Amendment review.

In the present case, the State court committed clear error when it allowed the prosecution to buttress the otherwise insufficient affidavit for search warrant with the oral post hoc testimony of the issuing magistrate. This is in direct conflict with rulings of this Court. See Whitely v. Warden, 401 U.S. 510, 565, n. 8; Aguilar v. Texas, 378 U.S. 108, 109, n. 1; Stone v. Powell, 428 U.S. 465, n. 3. Moreoever, the informant who provided the information which served as the basis for the search warrant was wholly unreliable. He was, on the basis of the record, a chronic liar, a transient, an admitted felon -- having written approximately five fraudulent checks in the seventeen-day period that he was in Montana (St. tr. 36), a dealer of illicit drugs (St. tr. 39), and probably was mentally unstable (St. tr. 36). See

Spinelli v. United States, 393 U.S. 410 (1969); Aguilar v. Texas, supra.

Montana's admission in the lower courts concerning the unreliability of the informant stands as the clearest evidence of the utter unfairness of Petitioner's conviction. In the lower court proceedings Montana sought to bolster the credibility of its transient informant (Paul Hallett) by arguing that he had made admissions against penal interest. Petitioner responded by pointing out that Hallett had been promised immunity (Dep. 41, 42) and therefore was not making admission against penal interest. The State responded that the promise of immunity was meaningless because the only evidence the State had of Hallett's drug-related offenses was the word of Hallett (the informant) and that therefore there was insufficient basis for criminal action against Hallett! (State's Petition for Rehearing in U. S. District Court R. 26). Yet, the State proceeded not only to charge Petitioner on drug sales but also to convict him solely on the testimony of Paul Hallett!

(See note 8 of the present Petition).

In the face of this egregious conviction the Montana Supreme Court did nothing, except to affirm Petitioner's conviction through mistaken interpretation of Federal Fourth Amendment law. According to the Ninth Circuit such legal mistake, however, is not cognizable in the Federal habeas corpus proceedings since Stone v. Powell. Tisnado v. United States, 547 F. 2d 452 at 455, u. 2, (9th Cir. 1977) stated:

> "Since, under Stone v. Powell, the issue of whether the state court correctly applied the law of search and seizure is apparently totally irrelevant as long as state procedures were 'fair' ..."

See also Mack v. Cupp, 564 F. 2d 898 (9th Cir. 1977).

This absurd result cannot have been what this Court contemplated through its ruling in Stone v. Powell. Rather it appears that, where a state court commits clear legal error in deciding Federal Fourth Amendment claims, such error can, if serious enough, amount to a deprivation of a full and fair opportunity to present Federal Fourth Amendment claims.

The present case presents a striking example of what has been referred to as "The Myth of Parity." 5/ The Stone v. Powell opinion rejected the contention that federal judges are institutionally more capable of adjudicating Federal constitutional claims than their state counterparts. This assumption has been roundly criticized by Professor Neuborne who states:

> "I suggest that the assumption of parity is, at best, a dangerous myth, fostering forum allocation decisions which channel constitutional adjudication under the illusion that state cours will vindicate federally secured constitutional rights as forcefully as would the lower federal courts." 90 Harv. L.R. 1105.

The present case presents clear evidence which bears out Neuborne's thesis. The Montana Supreme Court committed obvious and serious error in applying the Fourth Amendment to Petitioner's claim. It is

---

5/ - Neuborne, Burt, "The Myth of Parity", 90 Harv. L. R. 1105, April 1977

respectfully submitted that the error is so egregious that Petitioner virtually has not had a full and fair opportunity to litigate his Fourth Amendment claim.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted this 19th day of June, 1978.

GOETZ & MADDEN

James H. Goetz

CERTIFICATE OF SERVICE

I, James H. Goetz, the attorney for the Petitioner herein, and a member of the Bar of the U. S. Supreme Court, hereby certify that, on the 19th day of June, 1978, I served copies of the foregoing Petition for Writ of Certiorari on the opposing parties, as follows:

Mr. Jack Yardley
Park County Attorney
322 West Callender St.
Livingston, Mt. 59047

Mr. Allan Chronister
Office of Attorney General
State Capitol
Helena, Montana 59601

by mailing a copy thereof prepaid.

James H. Goetz

APPENDIX

	PAGE
Order of Court of Appeals, Ninth Circuit	A-1
Opinion and Order of Judge Battin, dated June 30, 1976	A-2
Order of Judge Battin, dated October 26, 1976	A-11
Opinion of the Montana Supreme Court, dated January 20, 1976	A-13
Sec. 54-132, R.C.M.	A-21
Sec. 54-133, R.C.M.	A-22
28 U.S.C. 2241	A-24
Application for Search Warrant ...	A-25

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DOUGLAS C. THOMSON Plaintiff-Appellant, v. L. JOHN ONSTAD and ROGER CRIST, Defendants-Appellees.	)	No. 77-1009 ORDER

Appeal from the United States District Court for the District of Montana

Before: BROWNING and WALLACE, Circuit Judges, and RENFREW*, District Judge

The judgment of the district court is affirmed on the basis of Stone v. Powell, 428 U.S. 465 (1976).

---

*Honorable Charles B. Renfrew, United States District Judge, Northern District of California, sitting by designation

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BUTTE DIVISION

DOUGLAS C. THOMSON, Petitioner, -vs- L. JOHN ONSTAD, Sheriff of Gallatin County, Montana; and ROGER CRIST, Warden, Montana State Prison, Respondents.	)	CV-76-14-BU OPINION AND ORDER

Petitioner, who was arrested during a search in which a quantity of drugs was siezed, was convicted of possession and sale of dangerous drugs. A pre-trial motion to suppress the seized evidence was denied. He appealed to the Montana Supreme Court, which affirmed his conviction. Petitioner has exhausted his state remedies as required by 28 U.S.C. § 2254.

FACTS.

Paul Hallett came to Livingston, Montana, on approximately November 1, 1974. On the evening of November 16,

Hallett was picked up by members of the Livingston City Police Department because of suspected felony fraudulent check charges pending in Nebraska. Hallett had also written about five fraudulent checks in Livingston.

About one and one-half hours after being incarcerated, Hallett informed the police that he had information regarding Thomson and dangerous drugs. Following discussions with the officers and the County Attorney, Hallett was promised immunity from prosecution on any drug-related charge.

Subsequently, Officer Mike Warren submitted an affidavit[1] for application of a search warrant, which was issued by Judge Shanstrom. Amphetamines, recovered in the search of the Thomson house, and Hallett's testimony resulted in Thomson's conviction.

---

1. Footnote from Opinion omitted. Footnote set forth in the affidavit in the Opinion. The affidavit is set forth separately in this Appendix at A-25.

During the hearing on the suppression motion, Judge Shanstrom, who was allowed to testify, stated that he had inquired of Hallett concerning the underlying circumstances of the alleged sale and that he was personally aware of Thomson's reputation as a suspect in drug activity. DISCUSSION.

The affidavit in support of the search warrant was insufficient and the attempt by the State to buttress the insufficient affidavit by offering testimony at the suppression hearing does not salvage the proceeding.

An affidavit must set forth the underlying circumstances necessary to enable the magistrate independently to judge the validity of the informant's conclusion and the affiant must support his claim that the informant was credible or his information reliable. Aguilar v. Texas, 378 U.S. 108 (1964); Spinelli v. United States, 393 U.S. 410 (1969); see United States v. Goldstein, ___ F.2d ____, No. 75-2207 (9th Cir., March 25, 1976).

The affidavit of Officer Warren, who

was neither present nor nearby on November 8, 1974, when Hallett allegedly entered the Thomson residence and purchased amphetamines, was based on information supplied by Hallett. But, there are no statements in the affidavit setting forth the underlying circumstances and supporting the credibility or reliability of Hallett. Such statements are important, since Hallett had only been in the Livingston area for approximately seventeen days, had passed fraudulent checks both in Livingston and in Nebraska, and had not been used previously by the police as an informer. The officers had no long-term background knowledge of Hallett. Although the Judge and the police had suspected the petitioner of drug activities, there was little independent investigation of this particular charge and no attempt on the officer's part to corroborate Hallett's information. Furthermore, Hallett's statement was not given against penal interest, since the County Attorney had promised him immunity on the night on which the warrant was issued.

This situation was squarely discussed by Justice White in his concurring opinion in Spinelli, supra, at page 423:

> But if the officer simply avers, without more, that there is gambling paraphernalia on certain premises, the warrant should not issue, even though the belief of the officer is an honest one, as evidenced by his oath, and even though the magistrate knows him to be an experienced, intelligent officer who has been reliable in the past. This much was settled in Nathanson v. United States, 290 U.S. 41 (1933), where the Court held insufficient an officer's affidavit swearing he had cause to believe that there was illegal liquor on the premises for which the warrant was sought. The unsupported assertion or belief of the officer does not satisfy the requirement of probable cause. Jones v. United States, 362 U.S. 257, 269 (1960); Grau v. United States, 287 U.S. 124 (1932); Byars v. United States, 273 U.S. 28, 29 (1927).
>
> What is missing in Nathanson and like cases is a statement of the basis for the affiant's believing the facts contained in the affidavit--the good 'cause' which the officer in Nathanson said he had. If an officer swears that there is gambling equipment at a certain address, the possibilities

> are (1) that he has seen the equipment; (2) that he has observed or perceived facts from which the presence of the equipment may reasonably be inferred; and (3) that he has obtained the information from someone else. If (1) is true, the affidavit is good. But in (2), the affidavit is insufficient unless the perceived facts are given, for it is the magistrate, not the officer, who is to judge the existence of probable cause. Aguilar v. Texas, 378 U.S. 108 (1964); Giordenello v. United States, 357 U.S. 480, 486 (1958); Johnson v. United States, 333 U.S. 10, 14 (1948). With respect to (3), where the officer's information is hearsay, no warrant should issue absent good cause for crediting that hearsay. Because an affidavit asserting, without more, the location of gambling equipment at a particular address does not claim personal observation of any of the facts by the officer, and because of the likelihood that the information came from an unidentified third party, affidavits of this type are unacceptable.

Since such statements were not supplied, the affidavit proffered by Officer Warren is wholly insufficient.

The Fourth Amendment requires that facts establishing probable cause to

issue a search warrant be set forth within the four corners of the supporting affidavit. Montana has long followed that rule. Petition of Grey, 155 Mont. 508, 519 (1971). In State ex rel. Townsend v. District Court, 32 St. Rptr. 1163 (Dec. 1, 1975), the Court stated:

> Contemporaneous oral declarations to a magistrate cannot be used to bolster an insufficient affidavit in the attempt to establish probable cause, unless such declarations are sworn, signed, reduced to writing, and made a part of the affidavit.

This rule is also followed by the Ninth Circuit:

> The case poses an important problem in the evaluation of affidavits to determine probable cause for issuance of search warrants under the Fourth Amendment. We hold that all data necessary to show probable cause for the issuance of a search warrant must be contained within the four corners of the written affidavit given under oath. United States v. Anderson, 453 F. 2d 174 (1971).

But, the Montana Supreme Court deviated from this rule in the present case, distinguishing Townsend on the

following basis:

> On oral argument, counsel cited State ex rel. Townsend . . . for the proposition that the affidavit for search warrant cannot be supplemented by oral statements to the magistrate. That is correct and here we point out that the affidavit was wholly insufficient to establish probable cause, but being based on hearsay from an informant, the reliability of that informant may be checked by the magistrate.
>
> Page 4, State v. Thomson, No. 13050, January 20, 1976.

This Court does not agree with that position. The affidavit cannot be supplemented by the oral statements to the magistrate; the statements must appear in the affidavit. Furthermore, Judge Shanstrom's post hoc testimony at the suppression hearing cannot be used to buttress or salvage an insufficient affidavit.

The Court realizes that affidavits in support of search warrants should not be read in a hypertechnical way, since many affidavits are prepared in the haste of a criminal investigation. United States v. Ventresca, 380 U.S. 102 (1965).

But here the exigency of the situation was largely illusory. From the time Hallett made his statement to the time the application for warrant was presented to the Judge, four hours had elapsed; and the alleged drug transaction occurred eight days before Hallett was picked up. There was no need for immediate search.

As to the voir dire issue, the Court agrees with the Montana Supreme Court's conclusion.

Therefore, IT IS ORDERED that the petition for habeas corpus is granted.

IT IS FURTHER ORDERED that the petitioner be given a new trial within sixty (60) days of this order or the case be dismissed.

Done and dated this 30th day of June, 1976.

"James F. Battin"
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BUTTE DIVISION

DOUGLAS C. THOMSON, Petitioner, -vs- L. JOHN ONSTAD, Sheriff of Gallatin County, Montana; and ROGER CRIST, Warden, Montana State Prison, Respondents.	CV-76-14-BU ORDER

This Court entered an order June 30, 1976, granting Petitioner's request for habeas corpus and further ordering that the petitioner either be given a new trial in the state court or that his case be dismissed.

July 12, 1976, the state petitioned the Court for a rehearing and filed a supporting brief. Petitioner resists the granting of a rehearing and has filed a brief in support of that position.

July 6, 1976, the United States Supreme Court announced its decision in Stone v. Powell, ___U.S. ___, 96 S.Ct.

3037 (1976). That decision is controlling here. In Stone, the Supreme Court held that

> ". . . where the state has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at trial." Stone v. Powell, 96 S.Ct. at 3052.

The petitioner in this case was afforded a state hearing on the issues raised here. State v. Thomson, ___ Mont. ____, 545 P.2d 1070 (1976).

The Court having before it the briefs of the parties and after full consideration thereof,

IT IS ORDERED that the Opinion and Order of this Court entered June 30, 1976, be, and hereby is, vacated.

IT IS FURTHER ORDERED that the petition for habeas corpus is denied.

Done and dated this 26th day of October, 1976.

"James F. Battin"
United States District Judge

IN THE SUPREME COURT OF
THE STATE OF MONTANA

THE STATE OF MONTANA,
Plaintiff and Respondent,

vs.

DOUGLAS C. THOMSON,
Defendant and Appellant.

No. 13050

MR. JUSTICE CASTLES delivered the opinion of the court.

This is an appeal from a judgment of conviction entered on a jury verdict of guilty. Defendant Douglas C. Thomson was convicted on two counts, possession and sale of dangerous drugs in Park County, the Honorable Robert H. Wilson, presiding.

Prior to trial, defendant moved to suppress any evidence obtained as a result of a search warrant. The motion, after hearing, was denied. The appeal is based on the denial of the motion to suppress, and on two jury selection procedural matters.

One Paul Hallett was a prisoner in the Livingston city jail, having been arrested on a fraudulent check charge. On the evening of November 16, 1974, Hallett asked to see an officer and asked if the officer would like certain information relating

to drug sales by defendant. Hallett was later interviewed by the county attorney.

On the basis of the information received the county attorney prepared an application for a search warrant. In the early morning hours of November 17, 1974, the application was presented to District Judge Jack D. Shanstrom in his home. Two police officers, the county attorney, and Hallett Met with Judge Shanstrom. After examining the application, Judge Shanstrom placed Officer Warren and the informant Hallett under oath and examined each of them for about twenty minutes. The examination included discussions of Hallett's information about defendant and one Adams, who was then under a deferred imposition of sentence from Billings for drugs. The Judge was familiar with both defendant and Adams and examined the informer Hallett extensively in detail on his knowledge of both subjects, the drugs, and the location of the drugs. Based on the application and on his independent examination of the informant Hallett as to both his own involvement and his knowledge, Judge Shanstrom issued the search warrant.

Prior to trial at a hearing on the motion to suppress Judge Robert H. Wilson presided. Judge Shanstrom testified and was cross-examined. Judge Wilson denied the motion to suppress. Judge Wilson tried the case with a jury.

Defendant's basic issue on appeal is whether the search warrant was issued on probable cause.

[1] Defendant approaches his argument — that there was not probable cause shown — in a sort of two pronged manner. First, he suggests that because Judge Shanstrom questioned the informant about features within the Judge's own knowledge, such as Adam's prior conviction and defendant's reputation, that he was not a "detached magistrate". We need not dwell long on this. It is clear from Judge Shanstrom's testimony that he was examining the informant to determine the reliability of his information. The informant was, in a sense, an itinerant unknown

who was being held in jail on another charge, but he was a named person.

Judge Shanstrom was the neutral member of the judicial branch of government whose duty it is to determine whether there was probable cause for the issuance of a search warrant. The probable cause for the issuance of a warrant was stated in the application but the source of that information was a named informant whose reliability had not been previously tested. Judge Shanstrom's examination of that informant on information known to the Judge made a reasonably reliable test of that information necessary to support reliability and thus probable cause. Defendant cites *United States v. United States District Court*, 407 U.S. 297, 92 S.Ct. 2125, 32 L.Ed.2d 752, and *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564, for the proposition that a "neutral and detached" magistrate is required. Neither case is applicable here. Both cases involved attorneys general, one without judicial approval; the other the attorney general acting as a justice of peace issuing his own search warrant, in effect.

[3] The second prong of the defendant's attack is that the informant's reliability was not established because he was unknown as to reliability. That is why Judge Shanstrom examined the informant — an independent means of establishing reliability. But, defendant argues that the application must in and of itself establish both (a) the reliability of the informant and (b) the underlying circumstance giving rise to the probable cause.

In *State ex rel. Glantz*, 154 Mont. 132, 137, 461 P.2d 193, 196, this Court said:

"• • • whenever an informer's statements are relief upon as probable cause, there must be a demonstration of the reliability or credibility of the informer."

See: *State v. Paschke*, 165 Mont. 231, 527 P.2d 569; *State v. Thorsness*, 165 Mont. 321, 528 P.2d 692.

Ordinarily, the reliability of the informer has been shown by

the informer's reputation as an upstanding citizen or by past performance; and in either event these facts can be stated in the application. But here, as previously set out, these facts did not exist so the issuing magistrate tested that reliability in a manner, under oath, designed to independently satisfy the magistrate of the accuracy of the information. We hold this to satisfy the showing of probable cause necessary for the issuance of the warrant.

[3] On oral argument, counsel cited *State ex rel. Townsend v. District Court*, Mont., 543 P.2d 193, for the proposition that the affidavit for search warrant cannot be supplemented by oral statements to the magistrate. That is correct and here we point out that the affidavit was wholly sufficient to establish probable cause, but being based on hearsay from an informant, the reliability of that informant may be checked by the magistrate. It is no doubt desirable to have a written record of that examination, but the exigencies of the nighttime situation did not permit such. The Judge testified and was subject to cross-examination. His only concern was as to the reliability of the hearsay, and heso testified. Thus, here oral testimony is not supplementing probable cause — it is merely providing a direct test of reliability by a conscientious magistrate. The cases on unnamed informants are not in point.

The two procedural matters in jury selection complained of arose in this manner:

Prior to the exercise of peremptory challenges, outside the presence of the jury, counsel for defendant challenged for cause the seating of a prospective juror, J.E. Gaab, on the grounds that he was an employee of the State Fish and Game Department and had been in law enforcement work. The challenge was denied. Mr. Gaab did not sit as a trial juror, but defendant claims error because he was obligated to use a peremptory challenge.

In defendant's brief on appeal it is stated that "Prospective juror, J.E. Gaab, admittedly was a law enforcement officer". In

point of fact juror Gaab was an officer of the Montana Fish and Game department.

Section 95-1909(d)(1), R.C.M.1947, states that "Each party may challenge must be tried by the court". Subsection (2) lists those reasons for which a challenge for cause may be taken. That subsection also provides that a challenge for cause may be taken "for any other reason which the court determines". Of the reasons listed in section 95-1909 only the final one would provide a reason for challenging a law enforcement officer for cause. Section 95-1909(d)(2)(x) states:

"For the existence of a state of mind on the part of the juror in reference to the case, or to either of the parties, which will prevent him from acting with entire impartiality and without prejudice to the substantial rights of either party."

[4-6] That section does not specifically exclude law enforcement officers from serving as jurors in a criminal case. Not being specifically provided for, law enforcement officers must stand on an equal footing with any other citizen as a prospective juror. Since defendant does not allege the existence of any particular state of mind which would place him within the strictures of subsection (x), other than the fact that he is a fish and game officer, no basis exists for his disqualification for cause. The bare fact that he is connected with law enforcement does not, without more, necessitate a finding that he would not be an impartial juror.

In *State v. Allison*, 122 Mont. 120, 129, 131, 199 P.2d 279, 285, the Court stated:

"It is a difficult matter at best to ascertain the real state of mind of a prospective juror with respect to detecting the existence of bias or prejudice against one accused of crime. For that reason this court has said (*State v. Russell*, 73 Mont. 240, 249, 235 P. 712, 715) that the determination of the qualification of a juror to serve in a case before the court 'must be left largely to the sound discretion of the trial court.' Again in *State v. Huffman*, 89 Mont. 194, 296 P. 789, 790, this court said: '• • •

the trial court is the judge of the weight to be given to the testimony adduced on a voir dire examination.' "

Assumedly, the district court could have removed juror Gaab for cause even without a clear showing of impartiality if the court had any doubt as to the juror's state of mind. Such a determination is within the sound judicial discretion of the court. Where the court does not exercise its discretion in removing a juror for cause when a challenge is made, this Court may reverse a conviction only where there is demonstrated a clear abuse of discretion. In the instant case no such abuse of discretion can be shown by defendant.

While a fish and game warden is a law enforcement officer in a narrow sense, the authority of those officers is limited in scope by Chapter 1, Title 26, Revised Codes of Montana. Section 26-110(2), R.C.M.1947, substantially states the law enforcement duties of wardens:

"They shall enforce the laws of this state and the rules of the commission with reference to the protection, preservation, and propagation of game and fur-bearing animals, fish and game birds."

The instant case deals with a violation of the general criminal law of the state of Montana, specifically the Montana Dangerous Drug Act. Prospective juror Gaab, as a game warden, has no connection with offenses committed in violation of the drug laws of this state. He has no power as a law enforcement officer in that respect and he stands as a private citizen. Without a showing of impartiality there can be no abuse in discretion by the trial court in refusing to allow that juror to be removed for cause.

[7] In *State v. Cadotte*, 17 Mont. 315, 316, 42 P. 857, 858 (1895), this Court found no error in refusing to remove a juror for cause where the juror was a brother-in-law of the county attorney who was prosecuting. There the Court said:

"Furthermore, the examination of this juror upon his *voir dire* does not at all tend to show any bias, either implied or actual."

It is clear then that, unless the juror falls within one of the categories of section 95-1909, he will not be removed for cause without a showing of partiality. In this case there is not only no showing of partiality, there is not even an allegation of partiality. The bare fact of Gaab's position as a game warden is not enough to create a doubt as to his impartiality, without more.

The district court record indicates that Gaab was removed as a juror through a peremptory challenge by defendant. In *Allison* the Court recognized that even if a doubt did exist as to the juror's state of mind, the fact that the defendant later removed the juror through the exercise of a peremptory challenge precludes the possibility of any prejudice to the defendant. In distinguishing *State v. Sims*, 51 N.M. 467, 188 P.2d 177, the Court stated:

"• • • In the case at bar, however, the defendant had three peremptory challenges left at the time the court overruled the challenge against the witness Leemhius and immediately following defendant's taking of exception to the court's overruling said challenge, the defendant exercised his sixth peremptory challenge to remove said juror. In the case at bar the court did not, as in the *Sims* case, force the objectionable juror upon the defendant after the latter had exhausted all his peremptory challenges, and so far as prejudice to the rights of the defendant is concerned, Leemhius did not sit on the jury which tried the defendant. The fact that defendant regarded jurors Jensen and Ronnin as undesirable gave him no right to have Leemhius excused for bias in order that defendant might get rid of one or two other jurors, no showing having been made that those prospective jurors were not qualified."

Defendant was not entitled to the removal of Gaab as a juror for cause, and even if he had been so entitled he was in no way harmed in his defense since Gaab did not sit on the jury.

[8] Next and last, defendant claims error in the answers in voir dire examination of jurors when juror Richard Cain was alleged to have answered in the negative a question as to whether any

potential juror was a member of a law enforcement agency or connected with a law enforcement agency. Defendant then alleges that Mr. Cain was a member of the Police Commission of the city of Livingston. These allegations by defendant do not appear in the record. They come by way of counsel's affidavit. The state presented a counter-affidavit from juror Cain denying that such questions were even asked. Aside from the fact that a police commissioner under Montana law, Chapter 18, Title 11, Revised Codes of Montana, 1947, is not a law enforcement officer and thus the answer would have been technically proper in any event, we do not accept affidavits to supplement an appellate record in this manner. *State ex rel Woodahl v. District Court*, Mont., 540 P.2d 312.

Finding no error, the judgment is affirmed.

MR. CHIEF JUSTICE JAMES T. HARRISON and MR. JUSTICES JOHN C. HARRISON, HASWELL and DALY concur.

The Montana drug sale statute (54-132 R.C.M.)

> 54-132. Criminal sale of dangerous drugs. (a) A person commits the offense of a criminal sale of dangerous drugs if he sells, barters, exchanges, gives away, or offers to sell, barter, exchange or give away, manufactures, prepares, cultivates, compounds or processes any dangerous drug as defined in this act.
>
> (b) A person convicted of criminal sale of dangerous drugs shall be imprisoned in the state prison for a term not less than one (1) year nor more than life.
>
> (c) Practitioners and agents under their supervision acting in the course of a professional practice are exempt from this section.

The Montana drug possession statute (54-133 R.C.M.)

> 54-133. Criminal possession of dangerous drugs. (a) A person commits the offense of criminal possession of dangerous drugs if he possesses any dangerous drug as defined in this act.
>
> (b) Any person convicted of a criminal possession of marihuana or its derivatives in an amount, the aggregate weight of which does not exceed sixty (60) grams of marihuana, or one (1) gram of hashish, shall, for the first offense, be guilty of a misdemeanor and is punishable by a fine not to exceed one thousand dollars ($1,000) or by imprisonment in the county jail not to exceed one (1) year, or by both such fine and imprisonment. A person convicted of a second, or subsequent, offense under this subsection is punishable by a fine not to exceed one thousand dollars ($1,000) or by imprisonment in the county jail not to exceed one (1) year or in the state prison not to exceed three (3) years or by both such fine and imprisonment.
>
> (c) A person convicted of criminal possession of dangerous drugs not otherwise provided for in subsection (b) shall be

imprisoned by imprisonment in the state prison not to exceed five (5) years,

(d) A person of the age of twenty-one (21)years or under, convicted of a first violation under this section shall be presumed to be entitled to a deferred imposition of sentence. Jurisdiction under this section shall be exclusively in the district court.

The Federal Habeas Corpus Statute (28 U.S.C. 2241)

§ 2241. Power to grant writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless—

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

June 25, 1948, c. 646, 62 Stat. 964; May 24, 1949, c. 139, § 112, 63 Stat. 105; Sept. 19, 1966, Pub.L. 89-590, 80 Stat. 811.

"On this 17th day of November, 1974, MIKE WARREN has personally appeared before me and having been sworn, deposes and says: That the offense of Felony, to-wit: POSSESSION OF DANGEROUS DRUGS has been committed:

"That he has good reason to believe and does believe that in and upon certain premises within the County of Park, State of Montana, particularly described as follows: the residence of DOUGLAS C. THOMSON, at 314 North Fifth Street, Livingston, Montana, that here have been and are now located certain items of Dangerous Drugs, the possession of which constitutes a criminal offense, said dangerous drugs being speed, amphetamine, and hashish, a derivitative of marihuana.

"That the facts which are the grounds of this application and upon which applicant relies to establish probable cause for the issuance of a search warrant are: That one Paul Hallett, did on or about the 8th day of November, 1974, enter into the house located at 314 North Fifth Street, Livingston, Park County, Montana, then occupied by Douglas C. Thomson, and did obtain 25 hits of speed which was taken from a larger package and said Paul Hallett was also offered hashish,

all of which dangerous drugs were taken by said Douglas C. Thomson, from a kitchen drawer or were observed in said kitchen drawer; that said Paul Hallett has been informed within the last 12 hours that the dangerous drugs above described are still in the house located at 314 North Fifth Street, Livingston, Park County, Montana.

"THEREFORE, the Applicant requests that a Search Warrant be issued, authorizing the search of the above described premises in the manner provided by law.

Mike Warren

Applicant"

"SUBSCRIBED AND SWORN to before me this 17th day of November, 1974.

Jack D. Shanstrom
District Judge"

Supreme Court, U. S.
FILED
JUL 17 1978
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1977

No. 77-1804

DOUGLAS C. THOMPSON,

Petitioner,

vs.

L. JOHN ONSTAD, SHERIFF, GALLATIN COUNTY, MONTANA; and ROGER CRIST, WARDEN, MONTANA STATE PRISON,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MIKE GREELY
Attorney General
State of Montana
Helena, Montana 59601

ALLEN B. CHRONISTER
Assistant Attorney General
State of Montana
Helena, Montana 59601
Attorneys for Respondent

JAMES H. GOETZ, Esq.
GOETZ & MADDEN
522 West Main Street
Bozeman, Montana 59715
Attorneys for Petitioner

COCKLE PRINTING CO., 1822 St. Mary's Ave., Omaha

TABLE OF CONTENTS

Pages

Argument:

A. The State Court has decided all Federal Constitutional Questions in accord with applicable decisions of this Court. 1

B. The District Court and the Ninth Circuit have correctly applied this Court's decision in *Stone v. Powell.* 5

C. The Petitioner was afforded a full and fair opportunity to litigate its Fourth Amendment claim. 8

Conclusion 10

CASES CITED

Aguilar v. Texas, 378 U. S. 108 (1964) 2, 4, 6

Fay v. Noia, 372 U. S. 391 (1963) 7

Gates v. Henderson, 568 F. 2d 830 (2d Cir. 1977) 7, 8, 9

Hines v. Auger, 550 F. 2d 1094, 1097 (8 Cir. 1977) 9

Holmberg v. Parratt, 548 F. 2d 745, 746 (8 Cir. 1977) 9

Jarrell v. Stahl, 446 F. Supp. 395 (W. D. N. C. 1977) 7

O'Berry v. Wainwright, 546 F. 2d 1204 (5 Cir. 1977) 7, 10

Petillo v. New Jersey, 562 F. 2d 903, 906 (3d Cir. 1977) 9

Spinelli v. U. S., 393 U. S. 410 (1969) 2, 4, 6

State ex rel. Townsend v. District Court, 543 P. 2d 193 (Mont. 1975) 2

TABLE OF CONTENTS—Continued

	Pages
State v. Leistiko, — P. 2d — (No. 13802, Decided May 1, 1978)	3
State v. Paschke, 527 P. 2d 569 (Mont. 1974)	2
State v. Thompson, 545 P. 2d 1070 (Mont. 1976)	2
State v. Thorsness, 528 P. 2d 692 (Mont. 1974)	2, 3
State v. Troglia, 482 P. 2d 143 (Mont. 1971)	2
Stone v. Powell, 428 U. S. 465, n. 3 (1976)	2, 5, 6, 7, 8, 9, 10, 11
Townsend v. Sain, 372 U. S. 293 (1963)	9
U. S. v. Goldstein, 532 F. 2d 1305, 1313 (9 Cir. 1976)	4
Wainwright v. Sykes, 433 U. S. 72, 79 (1977)	7

RULE CITED

Rule 19 of Rules of this Court	4

In The

Supreme Court of the United States

October Term, 1977

—o—

No. 77-1804

—o—

DOUGLAS C. THOMPSON,

Petitioner,

vs.

L. JOHN ONSTAD, SHERIFF, GALLATIN COUNTY, MONTANA; and ROGER CRIST, WARDEN, MONTANA STATE PRISON,

Respondents.

—o—

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

—o—

ARGUMENT

The respondent's argument that a Writ of Certiorari should not be granted in his case will be presented in the same order as the counter arguments raised in the petition.

A. The State Court has decided all Federal Constitutional Questions in accord with applicable decisions of this Court.

The petitioner relies upon Rule 19 of the Rules of this Court for the proposition that certiorari should be granted because decision of the Montana Supreme Court below is "squarely contrary to applicable Federal Constitutional Law." In *State v. Thompson,* 545 P. 2d 1070 (Mont. 1976) the Montana Supreme Court, in a unanimous decision, affirmed the petitioner's conviction on two counts involving the possession and sale of dangerous drugs.

That opinion dealt in large part with petitioner's two-pronged attack upon the warrant issued to search his residence. The petitioner argued that probable cause was lacking first because the issuing magistrate, District Judge Shanstrom, was not a "detatched magistrate," and second because the informant's reliability was not established. Both challenges to the warrant were decided against the petitioner, and he has evidently abandoned the first ground in this petition.

The thrust of petitioner's present argument upon this point seems to be that the Montana Supreme Court wrongfully held that the probable cause showing required by *Aguilar v. Texas,* 378 U. S. 108 (1964) and *Spinelli v. U. S.,* 393 U. S. 410 (1969) may be bolstered by testimony outside of the four corners of the affidavit. See *Stone v. Powell,* 428 U. S. 465, n. 3 (1976). This is not the case. The Montana Supreme Court has clearly recognized and abided by the decisions of this Court concerning the requirements for search warrants. See *State v. Troglia,* 482 P. 2d 143 (Mont. 1971); *State v. Paschke,* 527 P. 2d 569 (Mont. 1974); *State v. Thorsness,* 528 P. 2d 692 (Mont. 1974); *State ex rel. Townsend v. District*

Court, 543 P. 2d 193 (Mont. 1975); *State v. Leistiko,* — P. 2d — (No. 13802, Decided May 1, 1978).

As the Montana Supreme Court found, the affidavit below "was wholly sufficient to establish probable cause. . . ." (545 P. 2d at 1072). This is correct, since an affidavit that contains the underlying circumstances of how, where, when and what the affiant or informer observed is sufficient under Montana law and the United States Constitution to establish that probable cause exists for the issuance of a search warrant. In this case the affidavit disclosed the following facts:

(1) when the named informant acquired his knowledge;

(2) how he acquired this knowledge;

(3) where he acquired this knowledge;

(4) who was living at the named address at that time;

(5) what was purchased at that address;

(6) how much was purchased at that address;

(7) how the dangerous drugs were stored at that address;

(8) where in the house the dangerous drugs were located;

and

(9) confirmation that the informant had knowledge that the drugs were still located at that address or had been 12 hours previous to the application of the search warrant.

The Montana Supreme Court, recognizing that an affidavit for a search warrant cannot be supplemented by oral statements to a magistrate (*State ex rel. Towns-*

end v. District Court, supra), merely held that where the affidavit is based upon the statements of a known and named informant, that informant can be examined by the magistrate to further check the informant's reliability. This was found to be the purpose of Judge Shanstrom's examination of the informant (545 P. 2d at 1072).

Since both *Aguilar* and *Spinelli* involved unnamed informants, this Court held that the informant's reliability or the credibility of his information must appear within the four corners of the affidavit. When the informant is known, named and appears before the magistrate, however, the "cases on unnamed informants are not in point." (545 P. 2d at 1072). This distinction has been recognized by other courts. *U. S. v. Goldstein,* 532 F. 2d 1305, 1313 (9 Cir. 1976). Thus, the oral testimony was not to provide or supplement probable cause; it merely provided a "direct test of reliability by a conscientious magistrate (545 P. 2d at 1072).

The underlying circumstances that Judge Shanstrom knew from the application, together with the facts that he had a chance to examine not only the affiant but also the informant under oath and that unlike either *Aguilar* or *Spinelli* the informant was named and appeared, show that the *Aguilar-Spinnelli* tests were more than fulfilled. Therefore, there has been no decision by the Montana Supreme Court contrary to applicable Federal Constitutional law as required by Rule 19 of Rules of this Court.

B. The District Court and the Ninth Circuit have correctly applied this Court's decision in Stone v. Powell.

The District Court, by its Order of October 26, 1976, found that the petitioner "was afforded a state hearing on the issues raised," and therefore denied habeas corpus relief on the basis of *Stone v. Powell,* 428 U. S. 465 (1976).* That Order was affirmed by the Ninth Circuit, citing *Stone v. Powell.* The petitioner argues herein that these applications of *Stone v. Powell* were "wooden" and "incorrect."

The decision in *Stone v. Powell* need not be related in great detail since it is well known to the Court and

*It should be noted, as pointed out in the Petition, that the District Court initially granted the Writ of Habeas Corpus, finding that the affidavit in support of the search warrant was insufficient, and that probable cause could not be bolstered by testimony outside of the affidavit (see Appendix A-2 through A-10 to the Petition). That opinion was vacated and replaced by the Order of October 26, 1976, denying the petition (see Appendix A-11 to the Petition). It is evident that the District Court's second Order was based not only upon *Stone v. Powell,* but also upon the "briefs of the parties . . ." One of the points made by the State to both the District Court and the Ninth Circuit was that the District Court's original Order rested in part upon a misreading of the Montana Supreme Court's decision in this case. At page A-9 of the Original Order the District Court misquoted the Montana Court as having held that the affidavit was "wholly *insufficient* to establish probable cause" but that it was sufficiently buttressed by oral testimony of the informant. The District Court, of course, did "not agree with this position." To the contrary, the Montana Court's opinion stated that the affidavit was "wholly *sufficient* to establish probable cause" and that the informant's reliability could be further tested before the magistrate (545 P. 2d at 1072). Thus the assertion that the District Court's second Order was based simply upon a "wooden" application of *Stone v. Powell* looses some of its force.

the parties. This Court's holding was clear and explicit (428 U. S. at 481-82):

> We hold, therefore, that where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim the Constitution does not require that a state prisoner be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial.

The applicability of this holding to the present case is patent, especially when compared to the case of David Rice, one of the two respondents in *Stone v. Powell* (*See* 428 U. S. at 471-74). Rice, like the petitioner herein, was convicted in state court and that conviction was affirmed by the state supreme court.

He applied to the United States District Court for a Writ of Habeas Corpus, arguing that the warrant pursuant to which his home was searched was invalid under *Aguilar* and *Spinelli*. As this Court's footnote 3 to *Stone v. Powell,* clearly shows, Rice's *Aguilar-Spinelli* arguments were almost identical to those made here, although evidently an unknown informant was involved. Both the District Court and the Eighth Circuit granted Rice's petition for a Writ of Habeas Corpus, but this Court reversed in *Stone v. Powell,* holding as quoted above.

Thus, the applicability of *Stone v. Powell,* to the instant case is patent. Even assuming, *arguendo,* that there were "particularly egregious" Fourth Amendment violations here as the petitioner alleges, a very similar situation was presented in *Stone v. Powell,* with the result that this Court denied the availability of habeas corpus relief. This Court need not, therefore, reach the petitioner's argument that *Stone v. Powell* means something other than what its clear language indicates. Perhaps a case will arise affording the opportunity to make whatever clarifications, if any, are needed. The instant petition, however, is not such a case.

The petitioner's reliance upon *Jarrell v. Stahl,* 446 F. Supp. 395 (W. D. N. C. 1977), is similarly misplaced. While the *Jarrell* court evidently felt uncomfortable applying the clear holding of *Stone v. Powell,* it did so and denied habeas corpus relief (446 F. Supp. at 397). The court made it clear that it would like to grant relief since the crime involved was "victimless" and since it was particularly shocked with the way in which the convicting evidence was obtained, without a warrant or statutory authority (446 F. Supp. at 398). Even so, the *Jarrell* court conceded that there were a number of situations in which *Stone* should apply, one of them being cases involving searches pursuant to warrants based upon allegedly defective supporting affidavits (*Id.*). This, of course, is exactly the state of facts present herein. Thus *Jarrell v. Stahl* supports, rather than diminishes, the applicability of *Stone v. Powell* to the instant case.

Further, subsequent cases have made it clear that the *Stone v. Powell* holding means exactly what it says (*see Wainwright v. Sykes,* 433 U. S. 72, 79 (1977), and that within that holding considerable latitude for relief is still available on the question of whether a "full and fair" opportunity was afforded to litigate Fourth Amendment claims in state court. Compare, *e. g., O'Berry v. Wainwright,* 546 F. 2d 1204 (5 Cir. 1977) with *Gates v. Henderson,* 568 F. 2d 830 (2d Cir. 1977). Lastly, petitioner's reliance upon *Fay v. Noia,* 372 U. S. 391 (1963) in support of his argument that the Federal Courts

should have "exercised discretion" to grant relief here is misplaced in light of this Court's limitation in *Stone v. Powell,* of *Fay* in Fourth Amendment habeas corpus cases. *See* 428 U. S. at 491-92, n. 31. See also *Gates v. Henderson, supra,* at 839. As this Court made clear several times in *Stone v. Powell, (Id.*; 428 U. S. at 494-95, n. 37), that decision spoke only to Fourth Amendment claims and was based upon the practicalities of the deterrent aspect of the exclusionary rule. As this Court said (428 U. S. at 493):

> There is no reason to believe, however, that the overall educative effect of the exclusionary rule would be appreciably diminished if search-and-seizure claims could not be raised in federal habeas corpus review of state convictions.

Thus, whatever may be said for Federal Court flexibility in considering Fifth or Sixth Amendment claims in habeas corpus proceedings, those arguments no longer apply in Fourth Amendment exclusionary rule cases.

C. The Petitioner was afforded a full and fair opportunity to litigate its Fourth Amendment claim.

Petitioner's argument on this point is largely disposed of by the first issue discussed, *supra,* since it is based upon the premise that the Montana courts made a "serious legal error in construing the Federal Fourth Amendment." As previously discussed, no such error was made. Since the affidavit in support of the warrant was sufficient, there was no error and no conflict with prior rulings of this Court. Further, referring again to the case of David Rice, discussed, *supra,* the alleged error of law made by the state courts in that case was

the same type of error allegedly made here, and this Court denied relief to Rice in *Stone v. Powell.* The issue has therefore been decided, and no "absurd result" not contemplated by *Stone v. Powell,* has been reached.

Even so, the gist of petitioner's third argument is that despite *Stone v. Powell,* a United States District Court should grant a state prisoner habeas corpus relief if the state courts have incorrectly decided his Fourth Amendment claims. Assuming, *arguendo,* that there was an incorrect application of the Fourth Amendment claims below, this contention has been rejected by a number of courts. The court in *Petillo v. New Jersey,* 562 F. 2d 903, 906 (3d Cir. 1977), held:

> The question is not whether the trial court "correctly" decided the fourth amendment issue, but whether the petitioner was given an *opportunity* for *full and fair* state court litigation of his fourth amendment claim. (Emphasis original.)

The Second Circuit used similar language in *Gates v. Henderson, supra,* construing *Stone v. Powell* to hold "that we have no authority to review the state record and grant the writ simply because we disagree with the result reached by the State courts." (568 F. 2d at 840). *See also Holmberg v. Parratt,* 548 F. 2d 745, 746 (8 Cir. 1977); *Cf. Hines v. Auger,* 550 F. 2d 1094, 1097 (8 Cir. 1977). The emphasis of *Stone v. Powell* and later decisions following it is upon the fullness and fairness of the state court's opportunity to the defendant to present his Fourth Amendment claims.

Since the petitioner here does not allege that there are any factual issues in dispute, *Townsend v. Sain,* 372 U. S. 293 (1963), does not apply. The only application for *Townsend* in the *Stone v. Powell* context is when

there are disputed questions of fact, and the issue is whether they were fully and fairly litigated below. *O'Berry v. Wainwright, supra,* at 1211.

The petitioner does not argue that his Fourth Amendment claims were not fully and fairly heard in State court, but rather that he disagrees with the result reached. While state appellate court consideration alone of the Fourth Amendment claims probably suffices here under *Stone v. Powell, O'Berry v. Wainwright, supra,* at 1212-13, the petitioner was given the full opportunity to attack the search warrant upon Constitutional and factual grounds both in the suppression hearing at the trial level, and upon appeal to the Montana Supreme Court. The petitioner has been given his full and fair opportunity as required by *Stone v. Powell.*

———o———

CONCLUSION

The thrust of the petition herein is to erode this Court's ruling in *Stone v. Powell* and to limit its application. Contrary to petitioner's arguments, however, it is clear that *Stone v. Powell* means exactly what its explicit holding says: United States District Courts will not grant habeas corpus relief to a state prisoner on the basis of claimed Fourth Amendment violations if the prisoner has had a full and fair opportunity to litigate those claims in state court. The applicability of this holding to the present situation is patent, and becomes even more so when the facts herein are compared to those of defendant Rice in *Stone.*

The petitioner's attempts to find ways to evade *Stone v. Powell* are unavailing. The premise of these arguments rests upon the assumption that the Montana courts made a serious constitutional blunder when deciding the petitioner's Fourth Amendment claims. As shown above, this is not the case. Therefore, the petitioner's conclusion that he was thereby denied a full and fair state hearing is groundless.

Further, decisions following *Stone v. Powell* clearly indicate that the thrust of the inquiry is not into the technicalities of the state court's decision, but rather into the fullness and fairness of the opportunity to present the Fourth Amendment claims. *Stone v. Powell* is directly on point in cases such as the present one in which the state prisoner was given the opportunity at both trial and appellate levels to present fully his Fourth Amendment claims, and the state courts made good faith decisions to reject those claims.

It is respectfully submitted that all courts below acted within their constitutional responsibilities. Therefore, no reason exists for granting the instant petition for a writ of certiorari, and it should be denied.

Respectfully submitted,

MIKE GREELY
Attorney General
State of Montana

Allen B. Chronister
Assistant Attorney General
State of Montana
Helena, Montana 59601

DATED: July 21, 1978.